Congressional Censure

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A former assistant attorney general presented this scenario to Congress yesterday:

Congress passes a bill allowing the courts to appoint an independent special Watergate prosecutor answerable only to the courts. The President vetoes it and Congress overrides the veto. Then the President refuses to allow the files and papers accumulated by the Watergate prosecutors to be turned over to the court-appointed prosecutor on the grounds that his appointment was unconstitutional. A court battle up to the Supreme Court ensues, and resolution of the Watergate case is again involved in a constitutional crisis, or at least delayed another six months or a year.

For these reasons Roger C. Cramton, a former assistant attorney general, now dean of the Cornell Law School, said in testimony before the House and Senate Judiciary committees that Congress should forget about establishing an independent special prosecutor and instead censure the President so he could then resign honorably.

Cramton, President Nixon's constutional adviser until last March, characterized Mr. Nixon's recent actions in reversing his position on surrendering White House tapes after firing Watergate Special Prosecutor Archibald Cox as 'irrational."

He said the President looks like a cornered, desperate man" without competent advisers. "All the people who can bring bad news and the facts of life to him are all gone," Cramton said.

Cramton suggested a joint resolution censuring the President for breach of faith toward Congress as an alternative to bills establishing a special prosector which he said were unconstitutional.

Censure of Mr. Nixon, he said, "may clear the air and force the President to consider whether resignation of his office may not be an honorable course under the circumstances."

Cramton was head of the Legal Counsel Division of the Department of Justice from July, 1972, until March, 1973, when his routine tendor of resignation was accepted, an action Cramton said amounted to being fired.

Cramton said that the two most popular versions of

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bills to establish an independent special prosecutor were both "constitutionally suspect" and "unwise."

"At a time when the President has acted with doubtful legality and little wisdom, it is of the utmost importance that Congress avoid placing similar strains on the Constitution in its search for a remedy," he said.

A bill sponsored by 55 senators and more than 100 representatives calling for the court to appoint, supervise and control the removal of the special prosecutor is unconstitutional because it violates the separation of powers doctrine and allows the judicial branch to encroach unduly the functions of the executive, Cramton said.

A prosecutor is normally a functionary of the executive branch and, Cramton said, "The Constitution provides that "executive power shall be vested in a President of the United States."

A bill by Sen. Charles Percy (R-Ill.) calling for the President to appoint the prosecutor with the advice and consent of the Senate and with some sanctions on his removal would be unconstitutional because "controlling decisions make it clear that the President's power to remove executive officers cannot be infringed by Congress." Cramton cited the case of Myers vs. United States in which the Supreme Court held that a statute attempting to limit the President's power to remove postmasters was unconstitutional.

But Harvard Law School Prof. Paul A. Freund, testifying before the Senate Judiciary Committee, held that both methods would be constitutional.

Freund cited Article Two, Section 2 of the Constitution, which says Congress may appoint inferior officers in the courts, as allowing a court-appointed special prosecutor.

Freund said an 1879 Supreme Court decision upheld the court's right to appoint executive officers when it allowed the circuit court to appoint supervisors of federal elections.

Freund also said the Myers decision, a massive document of over 250 pages, expressly says the removal power of the President can be limited if the appointment power is placed somewhere else than in the presidency.